STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

OAKLAND COUNTY ROAD COMMISSION,
Public Employer-Respondent,

Case No. C09 F-088

-and-

MICHIGAN AFSCME COUNCIL 25, LOCAL 529,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Michael R. Kluck & Assoc., by Thomas H. Derderian, Esq., for the Respondent

Aina N. Watkins, Esq., for the Charging Party

DECISION AND ORDER

On July 21, 2009, Administrative Law Judge (ALJ) Doyle O'Connor issued his Decision and Recommended Order in the above matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On September 23, 2009, the Commission received a letter from Charging Party indicating that the dispute underlying the charge had been settled and requesting that the charge be withdrawn without prejudice. Charging Party's request is hereby approved. This Decision and Order and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

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Charging Party-Labor Organization.
_____/

Aina N. Watkins, for the Charging Party

Thomas H. Derdarian, for the Respondent

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the State Office of Administrative Hearings and Rules (SOAHR), acting on behalf of the Michigan Employment Relations Commission (MERC). This matter is being decided on summary disposition.

The Unfair Labor Practice Charge the Positions of the Parties:

A charge was filed with the Commission on June 12, 2009, by the American Federation of State, County and Municipal Employees Michigan Council 25, Local 529 (AFSCME or the Union) against the Oakland County Road Commission (the Employer), alleging that the Employer violated §10(1)(e) of the Act by failing to properly respond to several requests for information made by the Union.

The Union sought certain information from the Employer regarding two separate grievance disputes. Both grievances remain unresolved and are scheduled for hearing before separate arbitrators in September and October, 2009. The first grievance matter involved a promotional dispute and is referred to by the parties as grievance CLH-07. The second grievance matter involves the joint Employer-Union classification committee and a denial of a salary upgrade sought by one employee, with that matter referred to by the parties as grievance CLH-09.

As to the promotional grievance dispute, in July 2008 the Union sought email communications between managers regarding the competing candidates for the

promotion. That request was denied in a letter of August 1, 2008, which invited the Union to appeal the adverse decision regarding disclosure. The denial was premised on the assertion that the communications were confidential, and on the stated basis that the Employer's legal department had opined that "*PERA does not apply to the employer's promotion or failure to promote an employee*." On February 3, 2008 the Union appealed the denial of the requested information, as instructed in the denial letter, and renewed its request for the production of the documents. That request was denied in a letter of February 20, 2009, from the Employer's outside counsel.

As to the classification committee/salary upgrade dispute, on September 26, 2008 the Union requested various data on all salary upgrade decisions made since 1986. The Employer denied the request in a letter of September 29, 2008, offering several grounds. First, the Employer described the information request as "*an interrogatory request which we are not required to respond to under . . . PERA*" asserting that "*Management is only required to provide information that currently exists in a document*." Next, the employer asserted that it should not have to produce the records as it claimed that all the actions in question were done by a joint labor-management committee, such that records were equally in the possession of the Union. Finally, and in the alternative, the Employer offered that the Union could "*go through whatever historical information is available in Human Resources to see if information is relevant to your requests*." By a separate letter of February 3, 2008 the Union appealed the denial of the requested information, regarding the salary upgrade issue, and renewed its request for the production of the documents. That request was denied in the same letter of February 20, 2009, from the Employer's outside counsel. There is no indication that the Union ever pursued further the Employer's offer to allow the Union to inspect all existing records itself.

An order to show cause why an evidentiary hearing was necessary was issued on June 23, 2009, pursuant to Commission Rule 423.165, which allows for a pre-hearing dismissal of a charge, or for a ruling in favor of the charging party. Both parties filed timely responses, which reflected the absence of any material dispute of fact. Neither party requested oral argument.

Discussion and Conclusions of Law:

It is well-established that in order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must in a timely manner supply requested information which will permit the union to engage in collective bargaining and to police the administration of the contract. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. Where the information sought relates to discipline or to the wages, hours or working conditions of bargaining unit employees, the information is presumptively relevant and will be ordered disclosed unless the employer rebuts the presumption. *City of Detroit, Department of Transportation*, 1998 MERC Lab Op 205; *Wayne County*, *supra*. See also *E.I. DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538; 117 LRRM 2497 (CA 6, 1984). The standard applied is a liberal discovery-type standard. The employer has a duty to disclose the requested information as long as there exists a reasonable probability that the information will be of use to the union in

carrying out its statutory duties. *Wayne County, supra; SMART,* 1993 MERC Lab Op 355, 357. See also *Pfizer, Inc,* 268 NLRB 916; 115 LRRM 1105 (1984), enforced 763 F2d 887 (CA 7, 1985).

Where the union's request entails compiling specific information in the employer's possession, rather than producing existing documents, PERA allows the Employer to respond by granting the Union access to the necessary files. *Michigan State University,* 1986 MERC Lab Op 407, 409.

The Promotional Dispute (Grievance CLH-07) Information Request

The Employer response to the order to show cause asserted in a conclusory fashion that "*the Employer believes that the information that has not been disclosed is in no way relevant to the issues as contained in Grievance CLH-07* [regarding the promotional dispute]." Contrary to the Employer's assertion in its original denial letter, and despite its perfunctory response to the order to show cause, PERA does, and has always, included questions related to the granting or denial of employee promotions as encompassed within the duty to bargain. Evaluation procedures or other criteria which determine promotion or job retention directly effect conditions of employment and are therefore mandatory subjects of bargaining. See, *CMU Faculty Ass'n v Central Michigan Univ,* 404 Mich 268 (1978); *DPOA v Detroit,* 61 Mich App 487 (1975). Because such issues are mandatory subjects of bargaining, there is a statutory duty for the employer to provide potentially relevant information at the request of the Union. *Wayne County,* 1997 MERC Lab Op 679; *Ecorse Public Schools,* 1995 MERC Lab Op 384, 387.

The Employer additionally asserts that the charge was untimely filed more than six months after the initial denial of the information, but within six months of the denial of the appeal invited by the Employer and of the second request for the information. The Employer is correct that pursuant to Section 16(a) of PERA, a charge that is filed more than six months after the commission of the unfair labor practice is untimely. The limitation contained in Section 16(a) of PERA is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health,* 17 MPER 45 (2004); *Police Officers Labor Council, Local 355,* 2002 MERC Lab Op 145; *Walkerville Rural Communities Schs,* 1994 MERC Lab Op 582; *Detroit Federation of Teachers,* Local 231, 1986 MERC Lab Op 477. The six month period begins to run when the charging party knows, or should have known, of the alleged violation. *American Federation of State, County and Municipal Employees, Local 1583,* 18 MPER 42 (2005); *Huntington Woods v Wines,* 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836.

In *City of Adrian,* 1970 MERC Lab Op 579, 581, the Commission adopted the holding of the US Supreme Court in *Local Lodge No 1424 v NLRB (Bryan Mfg)* 362 Mich 411 (1960), rejecting "the doctrine of continuing violation if the inception of the violation occurred more than six months prior to the filing of the charge." However, as the Commission held in *Reese Pub Schs,* 1989 MERC Lab Op 476, 481, when a party has a continuing duty to bargain over a mandatory subject, but refuses repeated demands to bargain, the statute of limitations under Section 16(a) begins to run anew whenever the

other party makes a demand to bargain over the subject and is refused. Thus, in *Spring Lake Pub Schs,* 1988 MERC Lab Op 362, each refusal by the Employer to bargain with the Union and enter into an agreement over the content of a teacher evaluation form constituted a separate unfair labor practice. In *Jackson Fire Fighters Ass'n*, 1996 MERC Lab Op 125, a Commission administrative law judge, citing *Spring Lake*, held that the Union's renewal of its demand that the Employer include a nonmandatory subject in their collective bargaining agreement constituted a separate violation of PERA. See also *City of Detroit (DPOA)*, 21 MPER 70 (2008). Here, the Union sought information through both its original and its renewed requests, which existed and was in the Employer's possession, and which was presumptively relevant to the still pending grievance over the disputed promotion. The most recent denial was within the statute of limitations.

Because I find the charge was timely filed, and because I find that the Employer has offered no legitimate basis excusing its refusal to provide presumptively relevant information, I conclude that the Employer violated its duty to bargain under §10(1)(e) of the Act when it rejected, without valid grounds, the Union's February 3, 2008 request for information related to the promotional dispute raised by grievance CLH-07, such that the relief described below should be ordered.

The Salary Upgrade Dispute (Grievance CLH-09) Information Request

As to the classification committee/salary upgrade dispute and based on the analysis above, I likewise find the charge was timely filed. The Employer asserts that the undisputed facts establish that it did not refuse to provide information requested by the Union. The Employer's letter of September 29, 2008, began by denying the requested information, offering several grounds. First, the Employer described the information request as "*an interrogatory request which we are not required to respond to under . . . PERA*" asserting that "*Management is only required to provide information that currently exists in a document*." That ground was not a valid basis for refusing the Union's request for the duty under PERA is to provide available information, not just existing documents, such that there is a long recognized obligation to compile data and if necessary convert it to a usable format. See, *Michigan State University*, 1986 MERC Lab Op 407, 409.[1]

However, in the alternative, the Employer's letter of September 29, 2008, offered that the Union could "*go through whatever historical information is available in Human Resources to see if information is relevant to your requests*." The Union offers no explanation for why it did not respond to the Road Commission's offer to allow the Union to review the Employer's files itself. Likewise, the Union offers no explanation of how the Employer's offer constituted a denial of the request for the information. The Union's response to the order to show cause offered no basis to distinguish the Commission's decision in *Michigan State University*, *supra*, which was cited in the order,

[1] The Employer's denial letter also asserted that it should not have to produce the records as it asserted that all the actions in question were done by a joint labor-management committee, such that records were equally in the possession of the Union. While such a factual claim, if established, might provide a proper basis for refusing to provide duplicative documents, that issue was not substantively addressed by the parties in their responses.

and which held that granting the Union access to the necessary files was one appropriate means to respond to a request for the compilation of information. I find that the Employer did not deny the Union the information requested, and consequently did not violate the Act, regarding the classification committee/salary upgrade dispute. For that reason, I recommend dismissal of the portion of the charge related to the classification committee/salary upgrade dispute.

RECOMMENDED ORDER

The Oakland County Road Commission, its officers, agents, and representatives are hereby ordered to:

1. Cease and desist from

    a. Refusing to bargain collectively with AFSCME Michigan Council 25, Local 529, which is the representative of its public employees.
    b. Failing to provide arguably relevant information requested by AFSCME Michigan Council 25, Local 529.

2. Refusing to provide to AFSCME Michigan Council 25, Local 529 information which it requests, or has requested, and which is arguably relevant to the Union carrying out its duty to represent members or relevant to the policing or administration of the collective bargaining agreement, including:

    a. information and/or documents sought regarding the pending promotional dispute (grievance CLH-07);
    b. arguably relevant information and/or documents sought regarding other pending or future grievances.

3. Post the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: July 21, 2009

NOTICE TO ALL EMPLOYEES

Pursuant to a formal charge before the Michigan Employment Relations Commission, **OAKLAND COUNTY ROAD COMMISSION**, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

a. Refuse to bargain collectively with **AFSCME Michigan Council 25, Local 529**, which is the representative of our public employees.
b. Fail to timely provide arguably relevant information or documents requested by **AFSCME Michigan Council 25, Local 529**.

WE WILL

a. Bargain collectively with **AFSCME Michigan Council 25, Local 529**, which is the representative of our public employees.
b. In a timely fashion provide arguably relevant information or documents requested by **AFSCME Michigan Council 25, Local 529**.
c. Without further delay, provide to **AFSCME Michigan Council 25, Local 529** information which it requests which is arguably relevant to the Union carrying out its duty to represent members or relevant to the policing or administration of the collective bargaining agreement, including:

    i. information and/or documents sought regarding the pending promotional dispute (grievance CLH-07);
    ii. arguably relevant information and/or documents sought regarding other pending or future grievances.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

OAKLAND COUNTY ROAD COMMISSION

By:_____

Title:_____

Date:_____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.